FILED
JUL 1 1991
OFFICE OF THE CLERK

No. 90-1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED VAN LINES, INC.
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, JEANETTE P. SHULDA, JOHN SHULDA, CITIZENS MOVING AND STORAGE, ROYAL INSURANCE COMPANY, AND CALIFORNIA UNINSURED EMPLOYERS FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

RESPONDENT, JEANETTE SHULDA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK GOODCHILD
Counsel of Record
JACK GOODCHILD
A Professional Law Corporation
14545 Victory Boulevard, Suite 508
Van Nuys, California 91411
(818) 901-1169

Attorney for Respondent
JEANETTE SHULDA

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

No. 90-1878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED VAN LINES, INC.
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, JEANETTE P. SHULDA, JOHN SHULDA, CITIZENS MOVING AND STORAGE, ROYAL INSURANCE COMPANY, AND CALIFORNIA UNINSURED EMPLOYERS FUND,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

RESPONDENT, JEANETTE SHULDA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK GOODCHILD
Counsel of Record
JACK GOODCHILD
A Professional Law Corporation
14545 Victory Boulevard, Suite 508
Van Nuys, California 91411
(818) 901-1169

Attorney for Respondent
JEANETTE SHULDA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 3

1. Neither the decision below nor the record raises the questions presented in the Petition 3

A. The decision below would have been the same in regards to petitioner absent a finding that John Shulda was an employee of United Van Lines. 3

B. The decision below is supported by substantial evidence absent reliance on Department of Transportation and Interstate Commerce Commission regulations 5

SUMMARY 9

CONCLUSION. 10

TABLE OF AUTHORITIES

Page

Cases

Home Insurance Company v. WCAB (1982)
47 CCC 433 8

S.G. Borello & Sons, Inc. v. California
Department of Industrial Relations (1989)
48 Cal.3d 341, 256 Cal.Rptr. 543,
769 P.2d 399. . . . . 8, 9

Yellow Cab v. Workers' Compensation
Appeals Board (1991)
277 Cal.Rptr. 434,
226 Cal.App.3d 1288 9

Statutes

California Labor Code
Sections 3357 and 5705(a) 9

No. 90-1878

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

UNITED VAN LINES, INC.
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, JEANETTE P. SHULDA, JOHN SHULDA, CITIZENS MOVING AND STORAGE, ROYAL INSURANCE COMPANY, AND CALIFORNIA UNINSURED EMPLOYERS FUND,
Respondents.

RESPONDENT, JEANETTE SHULDA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Jeanette Shulda respectfully requests that this court deny the petition for writ of certiorari, seeking review of the judgment of the Court of Appeal of California, Fourth Appellate District, Division Two.

STATEMENT OF THE CASE

The decision below upheld the Opinion and Order Granting Reconsideration and Decision after Reconsideration of the respondent Workers' Compensation Appeals Board of the State of California dated October 16, 1990. That decision found that Jeanette Shulda was an employee, both jointly and severally, of her husband John Shulda and his employers United Van Lines, Inc. (petitioner) and Citizens Moving and Storage. Jeanette Shulda was awarded workers' compensation benefits based upon an injury which occurred during the course and scope of her employment on June 28, 1984. This injury rendered Jeanette Shulda a quadriplegic, requiring extensive medical care and round the clock nursing care. Both John and Jeanette Shulda at all times relevant to this matter were and continue to be residents of the State of California.

Originally, Jeanette Shulda's medical care and benefits were paid by Transit Casualty Company. Since January, 1986, due to the liquidation of Transit Casualty Company, Jeanette Shulda has been forced to rely upon Medicare for limited medical care. This situation continues today with our nation's taxpayers being forced to absorb a substantial burden for which petitioner should rightfully be responsible. This inequity is rendered even more egregious by the fact that both Transprotection Services Agency and petitioner are owned by the same privately held parent corporation, Uni-group. It was Transprotection Services Agency which offered and sold to John Shulda the ill-fated policy. This policy was supposed to provide workers' compensation coverage but did not. (See the May 13, 1987 decision of the respondent Workers' Compensation Appeals Board at page A-62 of Petitioner's Appendix). Until now, John

Shulda and his wife Jeanette Shulda have been forced to bear the full weight of the consequences of a decision which was beyond their control. Rather than coming forward to assist the victims of its business practices, petitioner has fought its legal and moral obligation at every turn.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the Petition.

A. The decision below would have been the same in regards to petitioner absent a finding that John Shulda was an employee of United Van Lines.

Both of the questions presented by petitioner presume that a finding below that John Shulda was an independent contractor would have eliminated liability as to respondent Jeanette Shulda by petitioner. This is clearly untrue. The respondent Workers' Compensation Appeals Board stated specifically in its opinion:

> "We note that in analogous situations, the courts have found that under Labor Code section 2705.5 an unlicensed contractor who is required to hold a license to perform the work contracted for is considered an employee of the hirer. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Meier)* (1985) 40 Cal.App.3d 5 [50 Cal.Comp.Cases 562], *Blew v. Earl Horner* (1986) 187 Cal.App.3d

> 1380 [51 Cal.Comp.Cases 615].) While the facts in *Meier* and *Blew* involved the applicability and interpretation of Labor Code section 2705.5, we believed that the fundamental principles and policies which underlie the Workers' Compensation Act and the fundamental policy that those hiring others to perform services should bear the risk of injuries incurred in the undertaking, as set forth in *Meier* and *Blew*, are applicable to the present matter. We note that by analogy to *Meier* and *Blew*, even if the defendant John Shulda in this matter was an independent contractor, he was uninsured and his principals, United and Citizens, would be liable." (Petitioner's Appendix Page A-4).

The applicability of this reasoning to the instant matter is rendered even more appropriate by the fact that John Shulda was uninsured only because of the actions of the petitioner's sister company, Transprotection Services Agency, which selected and sold the faulty policy.

Further, as stated by the trial judge in his Report and Recommendation on Reconsideration (Appendix to Petition Page A-7 at A-18):

> "United also contends that they are immune from California Workers' Compensation law because they are engaged in interstate commerce. Historically, neither the constitution nor judicial decision support United's contention. Labor Code section 3203 cited by United has an exception within it which may account in part for the long history of cases in which state workers' compensation law has applied to carriers engaged in interstate commerce. Some

of these cases have already been cited in the Opinion and in this Report."

The cases referred to by the trial judge delineate the alternative grounds upon which substantial evidence may be found to support the decision reached.

B. The decision below is supported by substantial evidence absent reliance on Department of Transportation and Interstate Commerce Commission regulations.

Petitioner incorrectly presumes that the "right of control" test is the sole basis for a finding of employment. To the contrary, California Law has moved steadily towards a more economically realistic approach to this issue. In his Opinion on Decision, the trial judge refers extensively to Larson's treatise on Workmen's Compensation Law on this point. (See Appendix to Petition pages A-42 and A-43):

> "The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any workers whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection. So, for example, a dairy that turns over its milk to an expert cheesemaker in its own factor, [*sic*] pays him at so much per cheese, lets him hire any assistants

he pleases, and then takes over the cheese and markets it, is rightly held to be an employer, since it has contracted out the very heart of its own manufacturing process, and since the workman is not in a sufficiently independent business to be expected to carry his own protection." (Larson's Workers' Compensation Law, 1B, section 43.51, citing *Green Valley Coop. Dairy v. Industrial Commission,* 27 N.W. 2nd 454) United claims that it only has various clerical and management employees directing this vast network of goods in interstate transport. It otherwise denies employment of the very heart of its business, that which makes it possible for the goods to be transported: the drivers and the helpers who travel with them."

> ". . . If I regularly, year in and year out, engage an individual trucker to transport logs from my woods to my lumber mills, which is an integral part of my lumbering operation, paying him by the load, and reserving no right of control over the details of his work, it is quite possible that this man is as appropriate a subject for compensation protection as any worker that could be found. He is taking a regular and continuous part in the manufacture of my product; his work is hazardous; his rate of pay is such that he and his family cannot be expected to bear the cost of industrial accident; and his place in the industrial process is not such that he could distribute the risk of the protection afforded by the

> legislation. As a result . . ., the overall development of compensation law shows that the concept has been broadened and altered . . . to fit the peculiar needs and purposes of compensation law. It is significant that in areas where the courts fail or are unable to do this, the legislature frequently fills the gap, so that the net result of legislation and judicial decision ultimately approaches coverage of the persons who need the benefits of the act." (Larson's Workmen's Compensation Act, 1B, section 43.42)"

"The driver and his helper come within the ambit of the class of people that the workers' compensation law is designed to protect. The fact that the employer did not have hands-on control over the manner in which John Shulda drove or Jeanette Shulda helped load and unload does not refute the employment relationship."

"In *Johnson v. SCAB,* a cleaning lady was found to be an employee and not an independent contractor. The Court of Appeals considered, among other things, the purpose and intent of the legislation, the persons sought to be protected, and the relative bargaining positions of the parties, ". . . mentally, economically and educationally" (39 CCC 565, 567). Clearly, the driver and helper in our case had little or no bargaining power. The "Independent Contractor's Agreement" was not negotiable. The driver could turn down a load,

> and he could also quit. Neither option was a viable one."

Relying on *Home Insurance Company v. WCAB* (1982) 47 CCC 433, the trial judge found that John Shulda was an employee of United Van Lines, Inc. As indicated by the court's reasoning above, the fact of petitioner's compliance with federal regulations played no significant role in reaching this decision. Rather than allowing a mechanical list of factors to decide the issue, the court focused instead on the "economic reality" of the relationship.

Two recent California cases further support this position as applied in the instant matter. In *S.G. Borello & Sons, Inc. v. California Department of Industrial Relations* (1989) 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, the California Supreme Court held that farm laborers are employees despite an agreement in writing that they are independent contractors, and a sharing in the profit or loss from the crop and the ability to manage their own labor. The court points out that the employer in this situation controls the overall operation of its business but simply chooses to accomplish one integrated step of its business by means of worker incentives rather than direct supervision, thereby retaining all necessary control over a job which can only be done one way. The employees are in no practical sense entrepreneurs operating independent businesses for their own accounts. As the court states (48 Cal.3d at 358):

> "Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury." (*Ibid.*) Where the principal offers no real choice of terms, but imposes a particular characterization of the relationship as

> a condition of employment, the workers' acquiescence in that characterization does not by itself establish a forfeiture of the Act's protections. (See *id.* at p. 359.)."

John Shulda testified repeatedly to a lack of bargaining power, both at the inception of and continuing throughout, his relationship with petitioner. All salient issues were determined by fiat by petitioner. Petitioner set the rates to be charged and paid as well as controlling who got which load and when. Petitioner reserved the right to enforce its policies through co-employer Citizens Moving and Storage. Petitioner exceeded federal regulations in the demands it made of its drivers. In general, petitioner sought to have its cake and eat it too by holding itself out to the public as a nationwide trucking company while literally eviscerating itself of the very employee relationships which make the petitioner's business possible. This factual pattern echoes that of *Yellow Cab v. Workers' Compensation Appeals Board* (1991) 277 Cal.Rptr. 434, 226 Cal.App.3d 1288, where the California Court of Appeal, First Appellate District, Division One, citing *Borello (supra)* relied upon California Labor Code sections 3357 and 5705(a) in finding a presumption of employment where the drivers of a taxicab company as active instruments of that enterprise, provided an indispensable and integral service to the employer without which it could not survive.

SUMMARY

In short, petitioner distorts the record by arguing that its compliance with federal regulations played an important role in the lower court's decision. To the contrary, as shown above, the court below, at the very most,

referred tangentially to these rules and based its decision on entirely different and unrelated grounds.

Petitioner further distorts the record by arguing that John Shulda negotiated an independent contractor relationship while the evidence reflects a contract of adhesion imposed by petitioner on a party without any bargaining power whatsoever. Petitioner also misrepresents the holding below. (See page 6 of Petition). Conveniently omitted is the language specifying that John Shulda was "an agent for" petitioner. Clearly implicit in this omitted language is the fact that Jeanette Shulda was an employee of petitioner regardless of whether John Shulda was an employee or not.

CONCLUSION

As no real question of interference with federal law is raised by decision and record below, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACK GOODCHILD
Counsel of Record

JACK GOODCHILD
A Professional Law Corporation

Attorney for Respondent
JEANETTE SHULDA